

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Petition of Ameritech for Forbearance)
from Dominant Carrier Regulation of its)
Provision of High Capacity Services in)
the Chicago LATA)

CC Docket No. 99-65

RECEIVED

MAR 31 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**OPPOSITION OF THE
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION**

The Competitive Telecommunications Association ("CompTel"),¹ by its attorneys, hereby opposes the petition of Ameritech for forbearance from dominant carrier regulation in the provision of high capacity special access and dedicated transport for switched access in the Chicago LATA.² By its petition, Ameritech requests forbearance from the Commission's Part 61 and Part 69 rules that apply to Ameritech's provision of special access and dedicated transport in the Chicago LATA.

Ameritech's petition comes on the heels of essentially similar petitions filed previously by U S WEST, SBC, and Bell Atlantic, and Ameritech's petition suffers from defects similar to those found in the other Bell Operating Company ("BOC") petitions. At the outset, Ameritech's petition fails to meet the forbearance criteria set forth in section 10 of the Act. Indeed, through its control of bottleneck facilities, Ameritech continues to possess market power in the special access and dedicated transport markets, which could enable Ameritech to engage in

¹ CompTel is the principal national industry association representing competitive telecommunications carriers and their suppliers. CompTel's more than 330 members include large national carriers as well as scores of regional carriers.

² Petition of Ameritech for Forbearance from Dominant Carrier Regulation of its Provision of High Capacity Services in the Chicago LATA, CC Docket No. 99-65 (rel. Feb. 16, 1999).

No. of Copies rec'd
List ABCDE

0+4

cross-subsidization and to circumvent its section 251(c)(3) unbundling obligations. Thus, the Commission should reject Ameritech's petition.

I. AMERITECH FAILS TO DEMONSTRATE THAT FORBEARANCE IS REQUIRED UNDER SECTION 10 OF THE ACT

In its petition, Ameritech seeks regulatory relief pursuant to section 10 of the Act.³ Pursuant to section 10(a), the Commission may only grant Ameritech's forbearance request upon a showing that:

1. Enforcement of dominant carrier regulations is not necessary to ensure that Ameritech's charges and practices are just, reasonable, and nondiscriminatory;
2. Enforcement of dominant carrier regulations is not necessary to protect consumers; and
3. Forbearance from enforcing dominant carrier requirements is consistent with the public interest.⁴

Because Ameritech's petition fails to satisfy these criteria, the Commission should reject Ameritech's petition.

Ameritech has not even made a *prima facie* case for forbearance from application of the Commission's dominant carrier regulations. Ameritech's petition itself demonstrates that Ameritech maintains monopoly control over the facilities used to provide basic local services and high capacity services in the Chicago LATA. By virtue of its monopoly control of these local facilities, Ameritech continues to possess market power in the special access and dedicated transport markets. This market power provides Ameritech with both the incentive and the opportunity to engage in cross-subsidization and other discriminatory behavior to the detriment

³ 47 U.S.C. § 160.

⁴ *Id.* at § 160(a)(1)-(3).

of competition and consumers. As a result, the application of dominant carrier regulation to Ameritech is necessary to (1) ensure that charges are just and reasonable, (2) protect consumers, and (3) serve the public interest. Thus, Ameritech's petition fails to meet the forbearance criteria set forth in the Act.

II. AMERITECH CONTINUES TO POSSESS MARKET POWER IN THE SPECIAL ACCESS AND DEDICATED TRANSPORT MARKETS IN THE CHICAGO LATA

Through its control of bottleneck facilities, Ameritech continues to possess market power in the special access and dedicated transport markets in the Chicago LATA. Allegations by Ameritech regarding the expansion capabilities of competitive local exchange carriers ("CLECs") are speculative and do not change the fact that Ameritech continues to maintain monopoly control over high capacity facilities in the Chicago LATA. Moreover, forbearance from dominant carrier regulation would permit – and indeed encourage – Ameritech to use its market power to engage in cross-subsidization and to circumvent its 251(c)(3) unbundling obligations.

A. Ameritech still enjoys market power in the Chicago LATA's high capacity market

In order to grant Ameritech's request for forbearance from dominant carrier regulations, the Commission must find that Ameritech does not have market power over high capacity services in the Chicago LATA. Market power exists when a carrier has the ability to raise prices by restricting output of its services,⁵ or when a carrier has sufficient control over the

⁵ See *Cable & Wireless, Inc.; Application for Authority Pursuant to Section 214 of the Communications Act of 1934 as Amended, to Provide Resold and Facilities-Based*
(continued...)

underlying facilities to enable it to discriminate against competing retail providers.⁶ When a carrier has market power – particularly when, like Ameritech, a carrier has a high market share and controls bottleneck facilities – the Commission consistently has imposed dominant carrier regulation.

Although several facilities-based and resale carriers have entered local markets in the Chicago LATA in recent years, Ameritech, according to its economist, Dr. Aron, still controls over half of the special access facilities in the Chicago LATA.⁷ Moreover, in the dedicated transport market, Ameritech controls 52% of the market in “Chicago City” and over 72% of the market in the “Chicago Suburbs.”⁸ Given Ameritech’s control over bottleneck facilities and its high market share, there is no reasonable basis for reclassifying Ameritech as a non-dominant carrier in the Chicago LATA.

Ironically, Ameritech relies on the Commission’s reclassification of AT&T as a non-dominant carrier to support its request for forbearance.⁹ However, in granting AT&T’s request for non-dominant status in the domestic interexchange market, the Commission expressly

(...continued)

Switched and Private Line Services between the United States and Russia and to Be Held Non-Dominant for All Services on This Route, 1998 FCC Lexis 1561, ¶ 6 (Apr. 2, 1998).

⁶ See *ntta.com, inc.; Application for Authority under Section 214 of the Communications Act of 1934, as Amended to Resell Non-Interconnected Private Line Services between the United States and Japan*, 1998 Lexis 313, ¶ 6 (Jan. 26, 1998). In addition to market share, the Commission’s market power analysis focuses on: (1) supply elasticity of the market; (2) demand elasticity of the customers; and (3) the carrier’s cost structure, size, and resources.

⁷ Dr. Debra J Aron, *An Analysis of Market Power in the Provision of High-Capacity Access in the Chicago LATA in Support of Ameritech’s Petition for Section 10 Forbearance* at 2 (“Aron Report”).

⁸ *Aron Report* at 21.

⁹ Ameritech Petition at 17-18.

relied on the fact that AT&T no longer controlled bottleneck facilities.¹⁰ In particular, the Commission focused on the fact that “AT&T [had] not controlled local bottleneck facilities for over ten years.”¹¹ Of course, Ameritech’s request is different because it continues to control bottleneck local exchange facilities while maintaining a dominant market share over facilities-based high capacity services. Thus, rather than support Ameritech’s petition, the Commission’s rationale in reclassifying AT&T as non-dominant militates against Ameritech’s forbearance request.

Perhaps recognizing this fatal flaw, Ameritech argues that its dominance of high capacity special access and dedicated transport facilities in the Chicago LATA does not constitute market power because Ameritech allegedly controls only a small portion of the “retail” market.¹² CompTel submits that Ameritech’s rationale is misleading, to say the least. Indeed, the fact remains that Ameritech maintains monopoly control over the facilities in the Chicago LATA used to provide high capacity special access and dedicated transport services. Control of these bottleneck facilities, and not “retail” market share, is the most telling indicator of market power. Moreover, if Ameritech is correct that the high capacity segment in the Chicago LATA is characterized by high demand elasticity, then Ameritech could easily increase its retail market share through modest retail pricing and marketing adjustments.¹³ So long as Ameritech

¹⁰ See *Motion of AT&T to Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 3308 (1995).

¹¹ *Id.*

¹² Interestingly, no data on the “retail” market for high capacity services is available from independent analysts, and Ameritech provided retail market share information to Dr. Aron. *Aron Report* at 2 n. 1.

¹³ See *Motion of AT&T to Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 3325 (1995).

maintains its dominant position over high capacity facilities in the Chicago LATA, the need to regulate Ameritech under dominant carrier regulation will continue.

B. Ameritech's claims regarding the expansion capabilities of CLECs are speculative and do not change the fact that Ameritech continues to possess market power in the Chicago LATA's high capacity market

Ameritech claims that competitors in the Chicago LATA can easily acquire or build additional facilities in a relatively short time period.¹⁴ However, Ameritech's arguments about the speed at which CLECs could expand in the Chicago LATA are mere speculation and do not change the fact that Ameritech continues to dominate the Chicago LATA's high capacity market. The ILECs have been making similar arguments about CLEC expansion since the mid-1980s when the ILECs were trying to escape the line-of-business restrictions of the AT&T consent decree. The truth of the matter is that Ameritech does not have sufficient information to forecast accurately the feasibility, cost, or timing of the build-out opportunities available in the Chicago LATA.

Rather than credit Ameritech's self-interested predictions of imminent facilities-based competition, the Commission should adopt a "show-me" approach and deny Ameritech's petition until it can show actual – as opposed to theoretical – facilities-based competition in the Chicago LATA to justify reclassification as a non-dominant carrier. Indeed, the premature deregulation of Ameritech in the Chicago LATA could act as a disincentive for CLECs to build-out their high capacity networks in Chicago. Simply put, if Ameritech is willing and able to charge below-cost rates for deregulated high capacity services, then CLECs currently operating in Chicago may become reluctant to invest additional capital in Chicago for fear of predatory

¹⁴ Ameritech Petition at 19-21.

pricing by Ameritech. As a result, Chicago consumers would be less likely to realize the benefits of real competition in the market for high capacity services.

C. Forbearance from dominant carrier regulation would permit – and indeed encourage – Ameritech to use its market power to engage in cross-subsidization and to circumvent its 251(c)(3) unbundling obligations, which would hurt competition and consumers.

Ameritech's petition fails to address the issue of cross-subsidization and ongoing compliance with the unbundling requirements of section 251(c)(3). Despite Ameritech's unwillingness to address these issues, both are of serious concern to CompTel. The underlying network that Ameritech uses to provide its high capacity services is the same network used to provide monopolistic local exchange and exchange access services.

Control over bottleneck facilities provides Ameritech with the opportunity and incentive to engage in harmful cross-subsidization, which could especially harm small interexchange carriers ("IXCs"). As the Commission is aware, BOCs and other incumbents offer two types of transport – direct-trunked and tandem-switched transport – over the same interoffice transport network. Small IXCs depend on Ameritech's tandem-switched transport for a high percentage (in some cases 100%) of their traffic, while the largest IXCs can use direct-trunked transport for a substantial percentage of their traffic. In its petition, Ameritech asks to have direct-trunked transport deregulated, implicitly conceding that it retains market power over tandem-switched transport. Were the Commission to grant Ameritech's request, Ameritech would have the ability and incentive to use its captive tandem-switched customers to cross-subsidize some or all of Ameritech's direct-trunked transport offerings in the Chicago LATA, which would hurt IXCs that rely on tandem-switched transport and carriers seeking to provide competitive direct-trunked transport.

Other types of cross-subsidization are easy to imagine. For example, Ameritech seeks forbearance from the prohibition against rate deaveraging for high capacity services in the Chicago LATA. Were the Commission to grant such relief, Ameritech could subsidize high capacity services in “Chicago City” with monopoly revenues obtained from service provided in the “Chicago Suburbs.”

Forbearance from dominant regulation also would give Ameritech an additional incentive not to comply with the unbundling requirements of section 251(c) of the Act. To date, Ameritech has failed to open its local monopoly to competition as required by the pro-competitive provisions of the Act, including section 251(c). Deregulating Ameritech’s high capacity services in the Chicago LATA would provide Ameritech with another reason to avoid complying with its statutory unbundling obligations. Forbearance from dominant regulation would in no way enhance competition and would only provide an additional mechanism for Ameritech to thwart competition in the local services market.

In filing its petition for forbearance, Ameritech’s concern appears not to be that it has lost market power, which it clearly has not, but rather that it has lost some percentage of the high capacity market. Forbearance from dominant carrier regulation cannot be brought about due to a mere decline in market share, but can be justified only based upon structural changes in the market that show that an incumbent is on competitive par with others in the market. Ameritech has made no such showing for the Chicago LATA, and thus the Commission should reject Ameritech’s petition.

III. CONCLUSION

For the reasons state herein, CompTel submits that the Commission should deny Ameritech's request for forbearance as a dominant carrier in the Chicago LATA.

Respectfully submitted,

**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION**

Carol Ann Bischoff
Executive Vice President
and General Counsel
**COMPETITIVE TELECOMMUNICATIONS
ASSOCIATION**
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036

Dated: March 31, 1999

By: 

Robert J. Aamoth
Michael B. Hazzard
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Fifth Floor
Washington, D.C. 20036
(202) 955-9600


Its Attorneys

CERTIFICATE OF SERVICE

I, Arethea P. Johnson, hereby certify that on this 31st day of March, 1999, served this day
a copy of the OPPOSITION OF THE Competitive TELECOMMUNICATIONS
ASSOCIATION foregoing by hand delivery to the following:

Jane Jackson
Federal Communications Commission
Chief, Competitive Pricing Division
Common Carrier Bureau
445 12th Street, S.W.
5th Floor
Washington, D.C. 20554

International Transcription Service, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036


Arethea P. Johnson